UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, as Next Friend Of A.C., a minor, And Justin Ho-Wee Wong	§	
	§	
Plaintiffs,	§	CAUSE NO. 3:07-CV-01767
v.	§	
	§	
Virgin Mobile Pty Ltd.	§	
	§	
Defendant.	§	

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

Plaintiffs, Susan Chang, as next friend of A.C., a minor, and Justin Ho-Wee Wong ("Plaintiffs") file this brief in opposition to Defendant's motion to dismiss, respectfully requesting that the Court deny Defendant's motion for the following reasons.

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I. STATEMENT OF FACTS

Plaintiff, Susan Chang, filed suit against Australian-based Virgin Mobile Pty Ltd. ("Defendant"), a wholly-owned subsidiary of Australia's Cable & Wireless Optus Pty Ltd. ("Optus"), on behalf of her minor daughter, A.C., for using an image of A.C. ("the photograph") in its "Are You With Us or What" advertising campaign (the "Campaign") without consent.

The Campaign, launched in June 2007 to promote free Virgin Mobile text messaging, featured a collection of over 100 photographed images downloaded at no cost to Defendant from Yahoo!'s photo-sharing website, Flickr.[1] These photographs—which are governed by various Creative Commons Attribution Licenses [2]—were displayed on billboards, newspaper ads, and on Defendant's website, accompanied by trenchant and often disparaging slogans.

The photograph of A.C. was taken on or around April 27, 2007, by her youth counselor, Justin Wong ("Justin"), of Fort Worth, Texas at a local church carwash, and later incorporated by Defendant into an ad that both encouraged viewers to "DUMP YOUR PEN FRIEND" and advertised "FREE VIRGIN TO VIRGIN TEXTING." Justin published the photograph on his Flickr page subject to a Creative Commons Attribution License. According to Shannon Chance Baylor, Yahoo!'s senior compliance paralegal, the photograph was stored on a Flickr server located in the state of Texas.[3] Defendant, as "licensee" of the photo, subsequently breached the license by failing, among other things, to properly attribute him as the photographer and original copyright holder on the billboards and website where the photograph was displayed.

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[1] Flickr, launched in February 2004, is a photo-sharing website and online community platform that allows its users to display and share photographs. Flickr hosts more than two billion images.

[2] Developed by the Creative Commons Corporation, these licenses are designed to provide a less restrictive means for sharing copyrighted works, such as photographs. They only address the creator's or artist's copyright and, therefore, do not eviscerate or supplant a person's independent right of privacy.

Several weeks after the photograph was uploaded onto Flickr, A.C. received an email from one of her friends with a picture of her on a billboard in Adelaide, Australia. Hoping to amicably resolve the issue without an attorney, the Changs contacted Virgin to discuss the ad, but it obstinately refused to accept any responsibility. By this point, the ad had incited the interest of news stations, legal commentators, and website bloggers across the world—and, as a result, was subjecting A.C. to ridicule among her friends and peers.

On September 19, 2007, A.C.'s mother, Susan, joined with Justin to file suit on her daughter's behalf. The Plaintiffs alleged that Virgin violated A.C.'s right of privacy, defamed her, breached the Creative Commons license that it entered with Justin, and infringed Justin's copyright. Defendant responded with a motion to dismiss on December 20, 2007, asserting that it was improperly served and not subject to the Court's personal jurisdiction. Plaintiffs re-served Defendant on February 1, 2008.

[3] *See* App 1, affidavit from Shannon Chance Baylor, Yahoo!'s Senior Compliance Paralegal, confirming that Yahoo! maintains servers in Texas "that are used to process, transmit or store images for Yahoo! Flickr users."

II. PROCEDURAL BACKGROUND

On January 18, 2008, after their first request for an extension to respond to Defendant's motion was granted, Plaintiffs commenced jurisdictional discovery by serving Defendant with their First Set of Interrogatories and Requests for Admission. Defendant responded to Plaintiffs' discovery on February 19 with a series of boilerplate, non-responsive objections—including 18 "stock" objections to Plaintiffs' 25 initial interrogatories and 41 objections to Plaintiffs' initial 52 requests for admissions. The few responses that were provided not only lacked jurisdictional relevance, but were patently inconsistent with statements made in several of Defendant's previous Court filings.

Despite Plaintiffs' repeated requests, Defendant obdurately refused to produce any responsive information, depriving Plaintiffs of the ability to fully assess the nature and extent of Defendant's jurisdictional contacts. Having exhausted their options, Plaintiffs filed and were granted a second motion for extension by the Court on February 22, 2008, so that they could obtain information responsive to their discovery requests through a motion to compel. Defendant finally agreed to properly respond to Plaintiffs' requests after reviewing their twenty paged proposed motion to compel.

After deposing two of Defendant's corporate representatives on the company's relationship with Optus and the process by which A.C.'s image was selected for use in the Campaign, Plaintiffs subpoenaed Yahoo!, Flickr's parent company, in the Northern District of California. The subpoena, which was issued on March 12, 2008, sought, *inter alia*, all records relating to the location of the Flickr server that stored the picture at issue. Yahoo! initially refused to produce the information, arguing that it was proprietary and irrelevant to the issue of personal jurisdiction. It ultimately agreed to comply, however, after corresponding with Plaintiffs counsel and reviewing counsel's letter explaining the significance of the servers' location and the merits of Plaintiffs' position. Upon learning that it would take Yahoo! approximately 45 days to produce this information, Plaintiffs sought a third extension to respond to Defendant's motion to dismiss. Despite Defendant's opposition, the Court granted the extension on June 6, 2008—the same day that Plaintiffs filed their supporting brief.

Plaintiffs filed their brief in opposition to Defendant's motion to dismiss on July 24, 2008, establishing that Defendant is, in fact, amendable to jurisdiction in this Court as a result of its contract with Justin Wong, its purposeful contacts with Flickr's Texas servers and the intrastate effects of its conduct.

III. INTRODUCTION

The first truly global method of communication, the internet has virtually eliminated geographical boundaries, enabling people to communicate from and access information located anywhere in the world without knowledge as to where the other person or information is located; along with this ability to instantaneously transcend territorial borders, however, comes an increased need to exercise jurisdiction over unscrupulous nonresident defendants,[4] like Virgin, that exploit the Internet to

[4] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980) (noting that the "limits imposed on state jurisdiction by the Due Process Clause . . . have been substantially relaxed over the years . . . largely attributable to a fundamental transformation in the American economy," and that '"[a]s technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958))); *see McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (noting a trend "expanding the

electronically obtain information from Texas servers and later misuse it abroad. Without the ability to subject these defendants to jurisdiction, Texas residents will have no means to deter foreign defendants from impermissibly using their property in other countries; this will be especially true in countries, like Australia, that do not recognize many of the privacy and property protections that exist in the United States.

Virgin's motion expediently ignores these issues, focusing instead on arguments that—if adopted by this Court—would extirpate a state's ability to protect its citizens from online threats that occur within its borders,[5] while enabling individuals and companies located in countries with less stringent property protections to benefit from the abundance of information stored on United States servers without liability for any subsequent misuse.

Contrary to what Defendant may believe, however, [c]yberspace . . . is not some mystical incantation capable of warding off the jurisdiction of courts built from brick and mortar."[6] This case provides the Court with a unique opportunity to demonstrate this principle by applying traditional notions of jurisdiction to prevent Virgin and other

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permissible scope of state jurisdiction over foreign corporations . . . [i]n part . . . attributable to the fundamental transformation of our national economy over the years," including a "great increase in the amount of business conducted by mail across state lines").

[5] *See* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951, 1955 (2005) ("In the internet context, defendants have generally claimed that a remote forum is precluded from jurisdiction because the contacts are only established through a server that is not within the forum. Defendants assert that their activities are not directed at the forum state. This type of argument challenges the very ability of sovereign states to protect their citizens within their borders.").

[6] *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-11 (D.C. Cir. 2002); *see also GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) ("We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction."); 4A WRIGHT & MILLER §1073.1, at 327-28.

nonresidents from misusing property electronically acquired in Texas then hiding behind a purported lack of physical contacts to evade liability.

IV. ARGUMENT AND AUTHORITIES

A. The Personal Jurisdiction Analysis

1. Due process and the Texas long-arm statute

Where, as here, there is no applicable federal statute providing for service of process, district courts apply the substantive law of the forum state to determine whether a nonresident is amenable to that state's jurisdiction.[7] A Texas court may exercise personal jurisdiction over an out of state defendant if (1) it is authorized by the long-arm statute, and (2) the exercise of jurisdiction comports with state and federal constitutional due process guarantees.[8] Because the limits of the former are coterminous with the limits of the latter, the sole and determinative issue is whether "the assertion of jurisdiction accords with federal due-process limitations.[9]

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[7] *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 424 (5th Cir. 2005) ("A federal district court hearing a case in diversity may exercise personal jurisdiction to the extent permitted for a court under applicable law of the state in which the federal court sits."); *Petroleum Helicopters, Inc. v. Avco Corp.*, 804 F.2d 1367, 1371 (5th Cir. 1986) ("[W]hen a plaintiff invokes federal question jurisdiction and server process under a state long-arm statute, a federal court can assert jurisdiction only if the state court could have done so."); *See* FED. R. CIV. P. 4(e)(1), 4(h)(1), 4(k)(1); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998).

[8] *Moki Mak River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007); *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 788-89 (Tex. 2005).

[9] *Alpine View Company Ltd. v. Atlas Copco AB*, 205 F.3d 208, 214 (5th Cir. 2000) (noting that "the Texas long-arm statute has been determined to have the same scope as the Constitution"); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 335 (5th Cir. 1999); *Michiana*, 168 S.W.3d at 788.

The due process clause protects an individual's liberty interest "in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[10] It accomplishes this by ensuring—as a condition to personal jurisdiction—that non-resident defendants have "certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[11] The sufficiency of these contacts is measured by the defendant's purposeful acts;[12] as long as the defendant's conduct is such that "he should reasonably anticipate being haled into court in the forum," minimum contacts will be found to exist.[13]

Application of the minimum contacts test varies depending upon the nature of the defendant's contacts.[14] When the contacts are sufficiently continuous, systematic and general, the court may exercise general jurisdiction over the defendant in a suit based on any controversy, regardless of whether it's related to the plaintiff's claims.[15] Specific jurisdiction exists, on the other hand, when the defendant's contacts relate to or give rise to the plaintiff's claims.[16] Where the non-resident defendant has purposefully established minimum contacts with the forum state, the exercise of jurisdiction is proper unless it would offend traditional notions of fair play and substantial justice.[17]

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[10] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

[11] *Woodson*, 444 U.S. at 297.

[12] *Id.*

[13] *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp.2d 27, 30 (D.D.C. 2004) (quoting *Woodson*, 444 U.S. at 297).

[14] *See Moki Mak*, 221 S.W.3d at 575; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415 (1984); *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994).

[15] *Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386 (5th Cir. 2008).

It is clear, given the nature of its contacts, that Virgin is subject to this Court's specific—not general—jurisdiction.

2. Plaintiffs' burden of proving personal jurisdiction

As the party seeking to invoke the court's jurisdiction, the plaintiff bears the burden of establishing that personal jurisdiction exists;[18] when, as in this case, the court decides the issue without conducting an evidentiary hearing, however, the preponderance of the evidence standard does not apply, and prima facie evidence of jurisdiction is sufficient. In resolving this issue, the court must accept the plaintiff's allegations as true and resolve all factual disputes in favor of jurisdiction.[19]

B. Defendant's Contact with Flickr's Texas Server is Sufficient to Satisfy Due Process

The sole and determinative issue in this dispute is whether personal jurisdiction extends to a nonresident that uses a website owned by a United States company to contract with and obtain a picture of a Texas resident off a Texas server from a computer in Australia. While this issue has not yet been decided in Texas, courts outside the state are seemingly becoming more receptive to treating electronic contacts as a basis for exercising personal jurisdiction over a nonresident defendant.[20]

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[16] *Id.*

[17] *Lewis v. Fresne*, 252 F.3d 352, 358-89 (5th Cir. 2001) ("A single act by a defendant can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted."); *SITQ E U., Inc. v. Reata Restaurants, Inc.*, 111 S.W.3d 638, 646 (Tex. App.—Fort Worth 2003, pet. denied).

[18] *Quick Tech., Inc. v. Sage Group PLC*, 313 F.3d 338, 343 (5th Cir. 2002); *Alpine*, 205 F.3d at 215; *Warfield v. Arpe*, 2007 WL 549467, at * 3 (N.D. Tex. 2007).

[19] *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999); *Barney F. Cogen & Co. v. Tred Avon Assocs, Ltd.*, 393 F. Supp.2d 519, 523 (S.D. Tex. 2005).

1. Defendant purposefully used Flickr to acquire pictures for use in its campaign

In what appears to be the first published opinion in Texas to address the jurisdictional effect of electronic contacts with computer servers, the Fort Worth court of appeals upheld the exercise of personal jurisdiction over a German travel company based solely on its unauthorized use of and contact with American Airline's servers.[21]

American filed suit against TravelJungle, a company registered in the United Kingdom, after learning that it had been extracting logos and flight data from American's servers—most of which were located in Texas—to provide travel and booking services to its customers.[22] The lawsuit was filed in Tarrant County and alleged breach of contract, tortuous interference, trademark infringement and misappropriation, among others.[23]

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[20] *Aitken v. Communications Workers of Am.*, 496 F. Supp.2d. 653, 660 (E.D. Va. 2007) (holding that spammer was subject to personal jurisdiction in state where server was located); *HY Cite Corp. v. BadBusinessBureau.com, L.L.C.*, 297 F.Supp.2d 1154 (W.D. Wis. 2004) (same); *Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc.*, 117 F. Supp.2d 1366 (N.D. Ga. 2000) (same).

[21] *TravelJungle v. American Airlines, Inc.*, 212 S.W.3d 841, 846-47 (Tex. App.—2006 Fort Worth, no pet.).

[22] *Id.* at 844.

[23] *Id.*

In holding that TravelJungle's contacts with American's server subjected it to personal jurisdiction in Texas, the court noted that "it is TravelJungle's *activity directed toward AA.com that is important,* rather than [its] actual awareness of the physical location of AA.com's servers."[24] After highlighting the similarities between scraping websites and sending spam emails, it concluded by emphasizing that nonresident defendants "should not be able to avoid personal jurisdiction by purposefully engaging in an activity directed towards a server located in a particular forum and then claiming ignorance of the location of that forum."[25]

The Southern District of Mississippi applied a similar analysis in exercising personal jurisdiction over a nonresident spammer in *Internet Doorway v. Parks*.[26] The plaintiff there filed suit against a Texas resident for sending unsolicited emails to people "all over the world, including Mississippi residents, advertising a pornographic web-site."[27] The plaintiff claimed that the email, which had been falsified to make it appear that it was being sent from his email address, jeopardized his goodwill in the community, and required him to devote substantial time and resources in responding to numerous complaints from the people who had received it.[28] Although the plaintiff's server was not damaged by the emails, the court emphasized that it was accessed when a recipient viewed the email.[29] Relying on this fact, the court concluded that the plaintiff's claims arose from defendant's contacts with the server, and denied the defendant's motion to dismiss for lack of personal jurisdiction.[30]

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[24] *Id.* at 851.

[25] *Id.* at 850.

[26] *Internet Doorway, Inc. v. Parks*, 138 F. Supp.2d 773 (S.D. Miss. 2001).

[27] *Id.* at 774.

[28] *Id.*

It is clear, upon applying these same principles here, that Defendant's contract with Justin Wong[31] and contacts with Flickr's servers make it amendable to personal jurisdiction in Texas. This conclusion, as demonstrated below, is supported not only by precedent,[32] but also established principles of personal jurisdiction.

The determinative inquiry, when examining specific jurisdiction, is whether Plaintiffs' claims arise from or relate to these contacts. [33] It is not necessary, as Defendant appears to suggest, that the claims be inextricably or intimately related with Defendant's contacts; the causative relationship is satisfied, instead, by simply establishing a "but-for" connection between the plaintiff's claims and the defendant's contacts: "[A] cause of action arises from or relates to a defendant's forum contacts when, but for those contacts, the cause of action would never have arisen."[34]

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[29] *Id.*

[30] *Id.* at 776-78.

[31] *Stewart v. Hennesey*, 214 F. Supp.2d 1198, 1203 (D. Utah 2002) ("Once a defendant knowingly enters into a contract through a website, whether by email or through electronic commerce, that defendant has purposefully availed him or herself of the privileges of the forum state. Hence the defendant has been given clear notice that it may be subject to suit there.").

[32] *See TravelJungle*, 212 S.W.3d at 850; *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp.2d 601, 617 (E.D. Va. 2002) (holding that ignorance of location is irrelevant where defendant sent spam emails); *MaryCLE, LLC v. First Choice Internet*, 890 A.2d 818, 833 (Md. 2006) (holding that defendant's electronic communications should subject it to jurisdiction in any state where they are received); *State of Washington v. Heckel*, 93 P.3d 189, 193 (2004) (holding that spammer has reason to know that he could be haled into court anywhere spam is received); *D.C. Micro Dev. Inc. v. Lange*, 246 F. Supp.2d 705, 711 (W.D. Ky. 2003) (finding jurisdiction based solely on defendant's electronic contacts with server).

[33] *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414 (1984); *see also Walk Haydel & Assocs., Inc. v. Coastal Power Production Co.*, 517 F.3d 235, 243 (5th Cir. 2008); *First Fitness Int'l, Inc. v. Thomas*, 533 F. Supp. 2d 651, 656 (N.D. Tex. 2008); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 789 (Tex. 2005); *TravelJungle*, 212 S.W.3d at 846-47.

This causal relationship is indubitably satisfied here, as all of Plaintiffs' claims directly arise from Defendant's contact with Yahoo!'s server. Had Virgin not obtained A.C.'s image and entered into a Creative Commons license through Flickr, Plaintiffs would not have suffered the damages that prompted them to file suit; it is these contacts alone that engendered both Plaintiffs' claims and the attendant damages.

Addressing a virtually identical issue, the Southern District of Texas recently applied the "but-for" approach in exercising specific jurisdiction over a Chinese defendant who misappropriated trade secrets from the United States in China:

> While S & D's trade secrets were allegedly misappropriated in China, the first step of the alleged misappropriation—learning the trade secrets—occurred in Texas . . . If they had not obtained the intellectual property in Texas, they would not have been able to misappropriate it. Thus, the alleged misappropriation arose from AAFIS's contact with this state. Accordingly, the Court may exercise specific jurisdiction over AAFIS for both claims asserted against it as long as such an exercise does not offend traditional notions of fair play and substantial justice.[35]

As in *S & D*, the first step of the misappropriation in this case occurred in Texas, where Defendant acquired A.P.'s picture from Flickr; if Defendant had not accessed the server, it would have neither obtained A.C.'s image nor entered into the Creative

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[34] *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579 (Tex. 2007) (citing *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981)); *see Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990).

[35] *S & D Trading Acad., LLC v. AAFIS, Inc.*, 494 F.Supp.2d 558, 567-68 (S.D. Tex. 2007) (citing *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004)) (holding that personal jurisdiction was proper over a nonresident defendant who "came to [the forum state] allegedly to receive the property that they eventually misappropriated and used to injure [the plaintiff]."

Commons license with Justin Wong. The fact that it was allegedly unaware that Plaintiffs lived in Texas or that Flickr's servers are located here is inapposite. Responding to this same argument, the court in *TravelJungle* stated:

> As to TravelJungle's contention that it did not know where AA.com's servers were located, we do not believe that it should be able to avoid personal jurisdiction by purposefully engaging in activity directed towards a server located in a particular forum and then claiming ignorance of the location of that forum. In this respect, this case is similar to federal cases holding that senders of spam e-mails are subject to personal jurisdiction in the forum in which their e-mails are received or where the server processing those e-mails is located. . . . *These cases focus, not on the defendant's actual knowledge of the destination of their e-mail activity, but on the deliberate nature of the defendant's activity*.[36]

But unlike in *TravelJungle*, where there was no evidence that the defendant knew or had reason to know where AA's servers were located, a brief review of Justin's Flickr profile and Yahoo!'s terms of service would have revealed that Justin is a resident of Fort Worth, Texas[37] and that Yahoo!'s servers are located in California, Texas, and Virginia.[38] Whether Virgin's purported ignorance was willful or merely an oversight is irrelevant; like in *TravelJungle* and cases involving spam emails, the focus should be on the fact that Virgin deliberately accessed Flickr's server—not whether it had actual knowledge of where its activity occurred. If the converse were true, nonresidents that intentionally ignored the target and destination of their online activities could commit torts, transact business, breach contracts and misuse property electronically obtained from servers

[36] *TravelJungle*, 212 S.W.3d at 850 (emphasis added) (citations omitted).

[37] App 5.

[38] *Yahoo! Terms of Service*, §7, *at* http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html (last visited July 24, 2008).

located in the United States without ever being subject to the personal jurisdiction of a Texas court.

By using servers located in Texas, entering a contract that created continuing and ongoing obligations with a Texas resident,[39] and purposefully accessing a website owned and operated by a United States company to acquire images for its "Are You With Us or What" campaign, Virgin, like senders of spam email, purposefully availed itself of the benefits of Texas law and thus "assumed the risk that [it] would be haled into a forum where the server is located."[40]

C. Exercising jurisdiction over Virgin does not offend "traditional notions of fair play and substantial justice"

After the Court determines that Defendant has the minimum contacts necessary to confer personal jurisdiction, it must examine whether exercising jurisdiction would comport would traditional notions of fair play and substantial justice.[41] In deciding this issue, courts consider the following factors: (1) the burden on the defendant; (2) the forum's state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversies; and (5) the shared interests of the several states in furthering fundamental substantive social policies.[42]

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[39] *Burger King*, 471 U.S. at 473 ("[P]arties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to the regulation and sanctions in the other state for the consequences of their activities.").

[40] *TravelJungle*, 212 S.W.3d at 850; *see Ralsky*, 203 F.Supp.2d at 618 ("Defendant's assumed the risk of injuring valuable property in Virginia by deliberately sending millions of UBE [spam e-mails] to and through Verizon's e-mail servers located in Virginia.").

[41] *Burger King*, 471 U.S. at 476-77.

Virgin claims that exercising jurisdiction would offend due process because it would "have to travel a great distance from Australia to defend itself in Texas" and it "is not familiar with the U.S. legal system." The burden on the defendant, however, is just one consideration; it appears, to date, however, that the distance between Texas and Australia has had no affect on Virgin's ability to challenge jurisdiction and participate in all other aspects of the case. Other than the possible expenses of traveling to Texas for trial, Virgin has not specifically identified how proceeding in the Plaintiffs' chosen forum will be more burdensome than any other jurisdiction or forum.

As for its second argument, the fact that Virgin itself may be unfamiliar with the U.S. legal system is irrelevant, as it has retained one of the largest law firms in the world as its local counsel.

The remaining factors clearly militate in Plaintiffs' favor. Texas has a strong interest in providing its resident with a convenient forum for redressing their injuries. Virgin has not identified another forum that is available or capable of adjudicating this dispute. Forcing Plaintiffs to start over in another court or jurisdiction would merely protract the resolution of the parties' claims and frustrate judicial economy.

Given Virgin's inability to present any compelling reason why exercising jurisdiction would be unreasonable, this Court should deny its motion to dismiss and allow this case to proceed to the merits.

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[42] *Wien Air Alaska v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999).

V. CONCLUSION AND PRAYER

It is evident after examining the nature of Virgin's deliberate contact's with Texas, and construing the pleadings and affidavits in the light most favorable to Plaintiffs, that Plaintiffs have established a prima facie showing of personal jurisdiction. It is for these reasons that Plaintiffs respectfully request that the Court deny Virgin's Motion to Dismiss and permit the case to proceed to the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of July 2008, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the Court's electronic case filing system. The system sent a "Notice of Electronic Filing" to the following attorneys of record, all of whom have consented to accept this Notice as service of the document:

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